

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

- - -

JILL BABCOCK,

Plaintiff,

vs.

Case No. 12-13010

STATE OF MICHIGAN and MICHIGAN
STRATEGIC FUND,

Hon. Marianne O. Battani

Defendants.

MOTION TO DISMISS

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Wednesday, March 19, 2014

APPEARANCES:

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1 Detroit, Michigan

2 Wednesday, March 19, 2014

3 at about 3:19 p.m.

4

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5 (Court and Counsel present.)

6 THE CASE MANAGER: The Court calls Babcock vs.

7 State of Michigan.

8 THE COURT: Good afternoon. May I have your
9 appearances, please?

10 MR. CHARARA: May it please the Court, Ali Charara
11 on behalf of the plaintiff.

12 MS. GROSS: Good afternoon, Your Honor. Assistant
13 Attorney General Christina Grossi on behalf of the defendant.

14 THE COURT: At some point I was told that you were
15 talking about settlement. Is that --

16 MS. GROSS: That's correct, Your Honor.

17 THE COURT: And are you still or no?

18 MS. GROSS: We are still in the process of doing
19 that, yes.

20 THE COURT: Okay. How close are you?

21 MS. GROSS: We have recently conducted I think just
22 a few weeks ago --

23 MR. CHARARA: Yes.

24 MS. GROSS: -- a site visit with the plaintiff's
25 expert witness where they walked Cadillac Place Building, and

1 they are supposed to turn their report over to us, and then
2 we will meet to see if we can agree to some of the findings
3 in the report.

4 MR. CHARARA: That report is complete, Your Honor,
5 and sister counsel and I discussed that I will turn over the
6 electronic files to her after court today.

7 THE COURT: Okay. All right. This is the
8 defendants' motion so you may proceed.

9 MS. GROSS: Thank you, Your Honor. This is the
10 defendants', State of Michigan and the Michigan Strategic
11 Fund's, motion to dismiss. There are basically two grounds
12 that the state is seeking dismissal of the entire complaint
13 in relation to; the first is 11th Amendment immunity and the
14 second would be standing, and I think those two defenses kind
15 of overlap in application in this case.

16 Plaintiffs have brought two claims under the ADA,
17 one being under Title 1 -- excuse me, Title 2 and the second
18 being under Title 3. It appears that during --

19 THE COURT: This is Title 3 though, right?

20 MS. GROSS: It appears during briefing that they
21 have withdrawn Title 3, so we are left with the Title 2 claim
22 and the claim that has been brought under the Rehabilitation
23 Act.

24 As to the Title 2 ADA claim, the state has asserted
25 11th Amendment immunity. We've provided case law for the

1 Court as to the grounds for our immunity. I think most
2 relevant in this case is probably the Popovich, the
3 6th Circuit case, which talks about the differences between
4 claims brought under an equal protection basis and those
5 brought under due process.

6 The complaint in this case is a little bit
7 different because the plaintiff's grounds as pled in her
8 complaint for her access to Cadillac Place are based on her
9 employment with an agency that is housed in Cadillac Place.
10 Normally you see employment claims brought under Title 1 but
11 what she's done in this case is said well, I access Cadillac
12 Place because of my employment but I'm bringing it under
13 Title 2 because there are programs and services that Cadillac
14 Place offers.

15 THE COURT: Now, what programs and services does
16 she partake of?

17 MS. GROSS: I don't know any, Your Honor. There
18 are none identified in the complaint. She essentially says I
19 work for the Michigan Economic Development Corporation and
20 therefore I go to Cadillac Place.

21 THE COURT: She doesn't allege anything like she
22 can't get into the building or she can't use the restrooms or
23 she can't --

24 MS. GROSS: She -- I think she generally -- I think
25 it is fair to say she generally identifies building defects

1 that interfere with her equal access to Cadillac Place. One
2 of the things she points out is parking, one of the things
3 she points out is just some ramps, I think she might mention
4 bathrooms in the complaint, but she doesn't tie those issues
5 to any denial of services, which is part of our standing
6 argument, which is to say under both the Rehabilitation Act
7 and ADA, but certainly I think it is easier to identify in
8 the Rehabilitation Act claim, you still have to point to some
9 program or service that you are being denied access to in
10 order to meet the standing requirement for suffering and
11 injury, otherwise there is just kind of this amorphous well,
12 I go to this building and, you know, there is an
13 architectural defect and therefore you are violating the ADA
14 and the Rehabilitation Act, and it seems to me both of those
15 acts are premised on equal participation in a program or
16 service.

17 In terms of the ADA claim, the standing issue
18 fleshes out a little bit more because when we asserted
19 11th Amendment immunity because you can't bring an equal
20 protection based claim the response was well, there is a
21 courthouse inside Cadillac Place. Well, there is no
22 allegation in the complaint that she has tried to access a
23 courthouse and she has been denied access to a courthouse,
24 that she is maybe a litigant in a proceeding or something of
25 that nature; it is just well, there is a courthouse there.

1 Well, not only do we think that's not sufficient to
2 pierce 11th Amendment immunity because we don't think that
3 makes the claim sound in due process, but we are also saying
4 you don't have standing for that type of claim because you
5 haven't identified any injury relating to any access to the
6 courthouse.

7 So those two issues in the ADA kind of flesh out,
8 and with the Rehabilitation Act claim it is the same thing,
9 we have said you haven't identified a program or service that
10 you can access -- can't access. Obviously Cadillac Place
11 houses lots of agencies, both private and public, there are
12 many services that go on there. No injury has been
13 identified with a particular service which causes concern
14 because the Rehabilitation Act's waiver of 11th Amendment
15 immunity is premised on a receipt of federal funds. Without
16 the receipt of federal funds there is no basis to pierce the
17 11th Amendment immunity.

18 So our response was well, you have to identify a
19 program or service so we can determine, number one, that the
20 state actually received financial funds -- or financial -- or
21 federal money for that service to make sure we have waived
22 11th Amendment immunity as to whatever you are alleging.

23 THE COURT: Well, do they allege here that the
24 building is the program kind of thing?

25 MS. GROSS: Yes, that's essentially the response is

1 the building is the program. I don't think that that --

2 THE COURT: The federal funds issue is really
3 secondary to this?

4 MS. GROSS: Yes, and they haven't -- essentially,
5 yes, I suppose if you are going to argue that the building is
6 the program then you would have to argue that we received
7 money to buy the building but, yeah, they are essentially
8 saying well, the building is the program. Well, our position
9 is it is not a program, there are programs inside of the
10 building, and I think the plain language supports that, and I
11 think that you also find that there is case law that talks
12 about the ability to provide access to a program by making
13 accommodations. I know there's some case law, I'm not sure
14 if it is referenced in the briefs, but there's some case law
15 that talks about moving programs to other buildings to have
16 access.

17 So I think to say just because the State of
18 Michigan owns a building then, you know, anything that goes
19 on must be compliant with the Rehabilitation Act, I mean,
20 certainly if the State of Michigan owned a building where
21 only employees were allowed I would argue, you know, there is
22 no basis for either Title 2 or the Rehabilitation Act because
23 there is no public access to that building. Maybe somebody
24 could bring a Title 1 claim and say based on my employment
25 I'm being denied equal opportunity and employment, but to say

1 well, just because the State of Michigan owns a building it
2 has to comply with both of these acts, so those are the two
3 bases.

4 I will say in response to the motion to amend
5 essentially plaintiffs have said well, allow us to cure these
6 defects if there are defects with the motion to amend.

7 THE COURT: They want to name individuals?

8 MS. GROSS: They want to name individuals, yes.

9 While that may cure an 11th Amendment challenge because
10 Ex parte Young, our position is most of these issues are
11 based on standing because the complaint is written so
12 broadly, and an Ex parte Young action won't cure an Article 3
13 standing problem. We have to have some injury that has been
14 identified so the defendants can properly defend, and that's
15 just not going to be cured by naming an individual defendant.

16 THE COURT: Title 2 is applied only against the
17 state, right?

18 MS. GROSS: Title 2 would only be applied against
19 the state.

20 THE COURT: So adding an individual what would that
21 do for you?

22 MS. GROSS: I assume if they wanted to add an
23 individual to try to say I'm bringing an Ex parte Young
24 action against that individual in their official capacity,
25 our position though is to bring a proper Ex parte Young

1 action that individual has to have some connection with the
2 alleged claim, and I don't know how you would get there in
3 this case.

4 THE COURT: Okay. All right.

5 MS. GROSS: Thank you, Your Honor.

6 THE COURT: Let's hear the response.

7 MR. CHARARA: Good afternoon, Your Honor.

8 THE COURT: Good afternoon.

9 MR. CHARARA: I'm going to start with the 11th
10 Amendment immunity. Defense counsel and us both agree that
11 under both the ADA and the Rehabilitation Act it is no
12 question that Congress has expressly abrogated 11th Amendment
13 immunity, so to talk about Popovich vs. Cuyahoga, yes, in
14 that case the court was dealing with a Title 2 claim brought
15 under the ADA, and in that case the court did note that the
16 plaintiff there had a claim that was both a violation of the
17 ADA and a violation of due process and so the court did that
18 proper analysis and concluded that, yes, for purposes of that
19 claim an 11th Amendment state immunity was validly abrogated
20 by Congress. However, the court never indicated --

21 THE COURT: Because due process was within the ADA
22 violation in that case?

23 MR. CHARARA: Yes, Your Honor, but the court never
24 indicated that a due-process claim was necessary. In fact, a
25 subsequent case by the United States Supreme Court, U.S. vs.

1 Georgia, found again that a Title 2 claim couched both
2 14th Amendment and ADA violations within it, but the court
3 did specifically state that where a claim alleges violations
4 of the ADA but not violations of the 14th Amendment, it is
5 within the discretion of the court to determine whether or
6 not the claim may proceed. In other words, just because an
7 ADA violation is not also a violation of the 14th Amendment,
8 due process or equal protection does not stop the plaintiff
9 from moving forward.

10 THE COURT: Well, that's what -- the 6th Circuit
11 talks about that, though, right?

12 MR. CHARARA: Correct, yes, and as does the United
13 States Supreme Court in the subsequent case.

14 Now, as for a due-process --

15 THE COURT: How do you distinguish that Popovich
16 court test?

17 MR. CHARARA: Well, Your Honor, the Popovich court
18 did create a test to say a due-process claim had to be
19 present. In that case they were dealing with a due-process
20 claim and held that because there was a due-process claim the
21 claimant could move forward but did not address the issue of
22 what would happen if there was not a due-process claim, which
23 is why I speak about the subsequent U.S. vs. Georgia case
24 where the Supreme Court held that where there is a
25 due-process claim as well as an ADA violation claim, of

1 course the claimant can move forward, but specifically quoted
2 and said that even if there is not the 14th Amendment claim
3 and there is only an ADA claim it is still within the
4 discretion of the trial court to determine whether the
5 plaintiff can move forward with the claim.

6 THE COURT: But didn't it say that equal protection
7 wasn't enough, that there had to be the due-process element
8 to abrogate the --

9 MR. CHARARA: No, Your Honor, not in United States
10 vs. Georgia. In United States vs. Georgia the Supreme Court
11 stated that an ADA --

12 THE COURT: No, in Popovich.

13 MR. CHARARA: I'm sorry.

14 THE COURT: That's the 6th Circuit case.

15 MR. CHARARA: Yes. In Popovich, like I said, Your
16 Honor, the Court held that in that case that the claimant did
17 have a due protection -- a due-process claim and allowed the
18 claim to move forward, but they weren't faced with an issue
19 where the claimant did not have a due-process claim, that
20 analysis was undergone in the U.S. vs. Georgia case that came
21 after, and that's where the Supreme Court first touched on
22 when a claimant is bringing a claim and has only an ADA
23 violation but not a due-process violation, and the court said
24 in those situations it is still within the discretion of the
25 trial court to allow the claim to move forward, i.e., just

1 because there is no due-process claim doesn't mean the claim
2 cannot move forward and does not mean that 11th Amendment
3 abrogation by Congress is invalid.

4 Now, Your Honor, as far as the due-process
5 violation is concerned, we have alleged in the complaint
6 here, specifically in the complaint before any of this arose,
7 that there are two courts within the Cadillac Place building,
8 a workers' compensation --

9 THE COURT: But your client has no connection with
10 the courts, she didn't say she had a case she couldn't get
11 to?

12 MR. CHARARA: Your Honor, our client is a
13 practicing attorney. That she didn't have any current
14 business in the workers' compensation court or the Court of
15 Appeals pending at the time of lawsuit was brought doesn't
16 change the fact that she is an attorney and a member of the
17 public who undoubtedly at some point in the future may have
18 to use the workers' compensation court or the Court of
19 Appeals especially as a practicing attorney.

20 THE COURT: What is the injury in fact here?

21 MR. CHARARA: The injury in fact is that she can't
22 gain access to the building and that includes everything
23 within the building.

24 THE COURT: She certainly gains access to get to
25 work, right?

1 MR. CHARARA: It is physically possible for her to
2 enter the building, but the ADA doesn't state that just
3 because it is physically possible to enter the building that
4 the ADA is compliant. The ADA states that access has to be
5 equal, and in these circumstance access is certainly not
6 equal because plaintiff endures great difficulty to gain
7 access to the building from the entrance ramps, from the
8 parking structure and even day-to-day activities like
9 attending the restrooms inside of the building.

10 THE COURT: I don't see that in her complaint, I
11 don't.

12 MR. CHARARA: I'm sorry, Your Honor, if it was
13 stated --

14 THE COURT: It sounds like she is complaining for
15 somebody else but not herself.

16 MR. CHARARA: I'm sorry, Your Honor. If it was
17 stated in more general terms in the complaint I can assure
18 you the plaintiff herself struggles with these everyday
19 activities to gain access to parking, from parking to the
20 building, and then through the ramp into the building while
21 she is in the building to access certain facilities such as
22 the restroom. These are all also documented in our expert's
23 report, which he has turned over to me today, which --

24 THE COURT: But it is not in the complaint and I
25 didn't know about, you didn't say she was an attorney, you

1 didn't say she practiced in that court, so she does appellate
2 work also?

3 MR. CHARARA: No, Your Honor, not at this time, but
4 she is a licensed attorney. And as far as the complaint
5 goes --

6 THE COURT: Every licensed attorney who has a
7 disability would not have a claim against that building?

8 MR. CHARARA: Your Honor --

9 THE COURT: You would have to practice there, you
10 have to have an injury in fact?

11 MR. CHARARA: Yes, Your Honor, but we don't -- to
12 start we don't need to narrow this case down to only access
13 to the courts because the complaint doesn't only -- the
14 complaint alleges unequal access to the building in general,
15 her place of employment, the courts within the building,
16 anything within the building. It doesn't change the fact
17 that the building is owned and operated by these two
18 defendants.

19 THE COURT: No, of course that doesn't change the
20 fact, that's really not an issue.

21 MR. CHARARA: Yes, Your Honor. And the only reason
22 the issue of the two courts in the building has been
23 litigated so intensely for purpose of this motion is to get
24 around 11th Amendment immunity because some courts have
25 determined that if you have a due-process claim that you can

1 bypass 11th Amendment, but that is why when we stated that if
2 that the Court holds that we need a due-process claim and
3 further holds that we have not alleged a proper due-process
4 claim then to name individual actors instead of the state
5 would eliminate any 11th Amendment issue, and the reason is
6 6th Circuit precedence clearly holds that if you are bringing
7 a suit against individual state actors, not the state itself,
8 and the suit is seeking declaratory or injunctive relief, not
9 money damages like our suit is, then the 11th Amendment does
10 not apply whatsoever. If the 11th Amendment does not apply
11 to this case then there is no need to bring a due-process
12 claim and the only claim that needs to be --

13 THE COURT: But doesn't Title 2, doesn't that only
14 go against the state, that's one question? And then the
15 other one says no qualified disabled person shall be excluded
16 from participation in or denied the benefits of services,
17 programs or activities. I would like that identified a
18 little better.

19 MR. CHARARA: Okay. To answer your first question,
20 Your Honor, yes, Title 2 applies to the state but not only
21 the state, Title 2 applies to any public entity so that's
22 any -- the state, any sub government underneath the state,
23 any agency, any instrumentality of the state, they are all
24 subject to Title 2.

25 Second of all --

1 THE COURT: But not individually?

2 MR. CHARARA: Your Honor, yes, an individual in
3 their official capacity is also subject to Title 2.

4 THE COURT: It is?

5 MR. CHARARA: Yes, Your Honor. Title 2 applies to
6 all government entities. If you are in your official
7 capacity working for a governmental entity then you are
8 subject to Title 2.

9 THE COURT: What about Ex parte Young?

10 MR. CHARARA: What about it, Your Honor?

11 THE COURT: How does that apply to the individuals?

12 MR. CHARARA: As far as amending our complaint to
13 name individuals?

14 THE COURT: Uh-huh, yes.

15 MR. CHARARA: It is our position that if we amend
16 our complaint to name individuals instead of the state then
17 the 11th Amendment no longer has any applicability, it is out
18 of the picture, and this becomes an ordinary ADA claim as if
19 it were against any non-state defendant. Without the 11th
20 Amendment hurdle in the way then you just have an ADA claim,
21 and then the question becomes does the plaintiff's complaint
22 allege an ADA violation, there is no need to look at whether
23 it alleges a due-process violation under the 14th Amendment.
24 That's why it is our position that if the Court finds that
25 our complaint did require a due-process claim to survive

1 11th Amendment immunity and did not do that that we can name
2 individual state actors and because our claim seeks only
3 injunctive and declaratory relief the 11th Amendment would be
4 of no applicability to this case and we could move forward on
5 an ordinary ADA claim and not have to look at due process,
6 Your Honor.

7 THE COURT: Okay. Thank you. Reply?

8 MS. GROSS: Just briefly, Your Honor. I think I
9 should mention the Georgia case; I don't think it is
10 applicable in this case. My reading of that case is that the
11 Supreme Court is saying when a plaintiff wants to bring an
12 ADA claim that is premised on a separate Constitutional
13 provision but applicable to the states through the 14th
14 Amendment's due-process clause you must prove a violation of
15 that other Constitutional provision, an actual violation in
16 order to bring it.

17 In that case I think it was an 8th Amendment, cruel
18 and unusual claim, and so the court was saying well, you are
19 going to have to actually prove the 8th Amendment violation
20 attributable to the states through the due process 14th
21 Amendment, and that's what the discussion was there.

22 In this case I don't think Georgia is relative
23 because Popovich is directly on point and is still good law,
24 and that says equal-protection-based claims are, you know,
25 barred, and this is clearly an equal-protection claim. It is

1 not a claim where we are even getting to the due-process
2 clause because there is no allegations in the complaint that
3 implicate the due-process clause.

4 Also, just briefly, I think the Court's concerns
5 and questions about the injury in fact are on point
6 regardless of the fact that Ms. Babcock might be a licensed
7 attorney. I honestly don't think she worked for her employer
8 in that capacity, I don't think there is anything in the
9 complaint about it, but nonetheless I still don't think
10 that's sufficient to prove injury. I don't think I could sue
11 the U.S. Supreme Court and say well, I'm an attorney and
12 someday I might be there so do X, Y and Z.

13 THE COURT: Well, did you get anything from the
14 complaint about -- let's say, parking or getting into the
15 building that is personal to plaintiff?

16 MS. GROSS: I think the plaintiff -- it is hard
17 because the complaint it almost appears that it could be a
18 class action because it makes these allegations on behalf of
19 her and other similarly -- I even think it uses the term
20 similarly-situated individuals, so I can't distinguish
21 between what actually has happened to her and what she is
22 saying just the general public might encounter. I believe
23 the parking issue is related -- is there and I can see
24 because she worked at the building that might be an issue
25 although the State of Michigan doesn't own parking, so it's

1 one of those things where there are things in the complaint
2 where she might say, you know, a ramp affects me but it is
3 difficult when you say I'm bringing this on behalf of myself
4 and all similar-situated individuals, particularly in the
5 ADA, because every handicap is different, every disability
6 may relate to a different I guess building design defect or
7 issue. For example, if I have a sight impairment, signage at
8 the building is going to be an issue, but it doesn't affect
9 me if I am a sighted individual in a wheelchair. So to just
10 say all disabled individuals have trouble accessing Cadillac
11 Place is just too broad to defend against. It needs to be,
12 you know, I have this disability, I have suffered this injury
13 because I can't access X, and that's just not in the
14 complaint in this case, so that's why we were having some
15 trouble when we responded saying it is 11th Amendment
16 immunity but it is also standing because we can't identify
17 what the issue is.

18 THE COURT: Okay. What about doing away with the
19 11th Amendment immunity by adding individuals --

20 MS. GROSS: Well --

21 THE COURT: -- in their official capacity?

22 MS. GROSS: Under the Ex parte Young doctrine, it
23 is difficult to say in a theoretical position whether or not
24 that could be done because I will say I have made many
25 challenges to 11th Amendment immunity or the Ex parte Young

1 doctrine when I see a plaintiff who just names an individual
2 state defendant. For example, I am going to name the
3 director of the Department of Corrections, I have brought
4 challenges saying inherent in Ex parte Young is that official
5 has some connection with the violation, that's the point of
6 Ex parte Young, it is to strip the official of their cloak of
7 immunity based on their bad conduct because the essence of
8 Ex parte Young is that an officer of the state doesn't act
9 illegally and if you are you don't get the 11th Amendment
10 immunity.

11 So I don't know in this case who you could say is
12 the relevant official for terms of her purported violations.
13 I think what I said in the brief though is I don't even think
14 we can get there because of the standing issue. So assuming
15 she could allay the Article 3 concerns I guess I can't say
16 that the state wouldn't want to bring another motion to
17 dismiss saying the Ex parte Young official -- or the official
18 you have named for purpose of Ex parte Young is not a proper
19 defendant.

20 THE COURT: If Ex parte Young even applies in this?

21 MS. GROSS: If Ex parte Young applies, yes. So I
22 guess I probably didn't address that in my brief and it was
23 probably because I said you are not going to get there
24 because you will not be able to cure the standing defect by
25 just naming an official.

1 THE COURT: Okay.

2 MS. GROSS: Thank you, Your Honor.

3 THE COURT: The Court -- I think they are very
4 interesting issues here and it seems like the building has
5 certain defects that needs -- may need, I don't want to
6 prejudge this, may need to be fixed, but I don't know that we
7 have the right plaintiff to fix those defects, so anyway the
8 Court is going to issue an opinion on this. Thank you very
9 much.

10 MS. GROSS: Thank you, Your Honor.

11 MR. CHARARA: Thank you, Your Honor.

12 (Proceedings concluded at 3:42 p.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of JILL BABCOCK vs. STATE OF MICHIGAN and MICHIGAN STRATEGIC FUND, Case No. 12-13010, on Wednesday, March 19, 2014.

s/Robert L. Smith

Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 08/14/2014

Detroit, Michigan